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## Contracts - Survey of Illinois Law for the Year 1946-1947

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included in the provision relating to incompetents and as the General Assembly had elsewhere declared that minor employees shall be considered the same as adult employees, the exclusion of minors from the saving clause was intentional.

Legislative cognizance of the rise in both wages and living cost is evidenced by changes in both the Workmen's Compensation Act<sup>70</sup> and the Occupational Diseases Act<sup>71</sup> through which increases in the amounts to be awarded for occupational injuries are granted.

## II. CONTRACTS

The field of general contract law was barren of significant decisions, as is usually the case, but some cases dealing with rather specialized branches of that subject are worthy of notice.

### INSURANCE

It is a well-settled rule that ambiguities in an insurance contract will be read in favor of the insured.<sup>1</sup> This rule was expanded to the breaking point in *Hooker v. New York Life Insurance Company*<sup>2</sup> wherein the court held that the beneficiary of an insured was entitled to double indemnity benefits though the facts of the insured's death seemed clearly to bring it within an exception clause. The deceased met his death through accident while a participant in maneuvers in New Zealand with the United States Marine Corps Reserve during time of war. The defendant admitted no liability under the double indemnity provision of the life policy, contending that the cause of death was within the policy exception which read: "... provided, however, that such double indemnity benefit shall not be payable if the insured's death resulted, directly or indirectly, from . . . war or any act incident thereto." Plaintiff contended the clause, by its very wording, applied only when the insured met his death in actual

<sup>70</sup> Laws 1947, pp. 962-75, H. B. 979; Ill. Rev. Stat. 1947, Ch. 48, §§ 144-5.

<sup>71</sup> Laws 1947, pp. 908-28, H. B. 980; Ill. Rev. Stat. 1947, Ch. 48, §§ 172.7-8.

<sup>1</sup> *Jabara v. Equitable Life Assur. Soc.*, 280 Ill. App. 147 (1935).

<sup>2</sup> 66 F. Supp. 313 (1946), noted in 25 CHICAGO-KENT LAW REVIEW 171, 12 Mo. L. Rev. 212 and 25 Tex. L. Rev. 313.

combat. Exceptions clauses of this nature roughly divide themselves into two classes, *i.e.* the status clause and the result clause. Where the former type has been used, the status of the insured at date of death as a member of the armed forces in time of war has generally been enough to relieve the insurer from liability as to the double indemnity provision.<sup>3</sup> Where the latter type is found, the problem becomes one of interpretation and the majority of courts have not hesitated to hold for the beneficiary unless the facts relating to the insured's death clearly fall within the exception.<sup>4</sup> The decision above noted was reversed by the United States Circuit Court of Appeals for this circuit when a majority of the judges thereof held that recovery on the policy was against the clear intent of plain excluding language.<sup>5</sup> The case of *Eggena v. New York Life Insurance Company*<sup>6</sup> was heavily relied on for the policy exception involved therein was identical and the facts were almost on all fours with the instant case.<sup>7</sup>

Two cases of interest involved the permissive user clause found in automobile liability insurance policies.<sup>8</sup> In *Zitnik v. Burik*,<sup>9</sup> the Illinois Supreme Court held that the permitted user of the insured car has the same duty to co-operate with the insurer as has the policy holder, so that a breach of this duty is ground for denial of the protection given by the policy. The case of *Scott v. Inter-Insurance Exchange*<sup>10</sup> was there distinguished. The plaintiff had argued that the duty of the user to co-operate was dependent on knowledge that the policy in question afforded pro-

<sup>3</sup> *Miller v. Ill. Bankers Life Ass'n*, 138 Ark. 442, 212 S. W. 310, 7 A. L. R. 378 (1919).

<sup>4</sup> *Boatwright v. American Life Ins. Co.*, 191 Iowa 253, 180 N. W. 321, 11 A. L. R. 1085 (1920); *Kelly v. Fidelity Mut. Life Ins. Co.*, 169 Wis. 274, 172 N. W. 152, 4 A. L. R. 845 (1919).

<sup>5</sup> 161 F. (2d) 852 (1947). Minton, C. J., wrote a dissenting opinion.

<sup>6</sup> 236 Iowa 262, 18 N. W. (2d) 530 (1945).

<sup>7</sup> A dissent by Minton, C. J., was based on the idea that the exception clause was insufficiently worded to exclude liability. He pointed out that the insured met his death as an incident to training for war and it would have been simple enough for the defendant to have added to the limiting clause the words "or an act incident to training for war."

<sup>8</sup> This clause has also been referred to as the "omnibus" clause.

<sup>9</sup> 395 Ill. 182, 69 N. E. (2d) 888 (1946), affirming 327 Ill. App. 170, 63 N. E. (2d) 635 (1945).

<sup>10</sup> 352 Ill. 572, 186 N. E. 176 (1933).

tection for him. The court indicated that such might be the rule, but said no benefit could be drawn therefrom since the evidence failed to show that knowledge was lacking.<sup>11</sup> The insurer had made several attempts to gain the details of the accident from the permitted user but in each instance was rebuffed, so the court was satisfied that there had been an absence of the co-operation required by the policy provisions.

In the case of *Pallasch v. United States Fidelity & Guaranty Company*,<sup>12</sup> an administrator brought garnishment against an insurer for collection of a judgment held against one Pallasch, an alleged permitted user, for the wrongful death of her intestate. The accident causing death occurred as Pallasch was returning the car of the named insured to a service station, of which he was the manager, after having spent some time repairing it after hours in a private garage with the aid of another employee of said station, the work being done without the consent or knowledge of Pallasch's employer. The insurer contended that Pallasch did not come within the permission clause because of an exception thereto.<sup>13</sup> The evidence showed that Pallasch had the car owner's permission to drive the car for repair purposes and the court, reversing a judgment for the defendant notwithstanding the verdict, held that under the facts stated and giving full weight to the exclusion clause, Pallasch was a permitted user within the meaning of the policy.

Another case worthy of mention, in which the subrogation rights of the insurer were involved, is *Inter-Insurance Exchange of Chicago Motor Club v. Anderson*<sup>14</sup> wherein it was held that if an insured, after payment by the insurer for damages done to his

<sup>11</sup> It would appear that there is no duty on the part of the insurer to inform the user of the policy protection, for the court said: "Whether defendant was required to give . . . notice of the protection afforded him . . . before there was any duty resting upon him to cooperate is beside the question, for the requirement of cooperation from the insured was not conditioned on such action." See 395 Ill. 182 at 188, 69 N. E. (2d) 888 at 890.

<sup>12</sup> 329 Ill. App. 257, 67 N. E. (2d) 883 (1946).

<sup>13</sup> That limitation purported to exclude from coverage "any person or organization or to any agent or employee thereof operating an automobile repair shop, public garage, sales agency, service station, or public parking place, with respect to any accident arising out of operation thereof."

<sup>14</sup> 331 Ill. App. 250, 73 N. E. (2d) 12 (1947).

property, gives a general release to the tort-feasor, the insurer may recover from the insured the full amount paid on the ground of a breach of the subrogation contract but will not be permitted to recover at the same time from the tort-feasor. The insured argued for the rule accepted by the court in *Chicago, Burlington & Quincy Railroad Company v. Emmons*<sup>15</sup> which had held that if, after payment by the insurance carrier for the loss, the insured has given, without consent or knowledge of the insurer, a release to the tort-feasor who possesses knowledge of such payment, that release is no bar to a suit by the subrogee carrier against the tort-feasor. Although the court admitted that authority existed for such rule,<sup>16</sup> it preferred to follow the view expressed in the Pennsylvania case of *Illinois Automobile Insurance Exchange v. Braun*<sup>17</sup> to the effect that the insured must reimburse the carrier where, by giving a valid release, he has "put it beyond the power of the insurer to obtain anything from the causer of the loss."<sup>18</sup> As was remarked by the court in the instant case, "... the purpose of the courts has been to protect the subrogation rights of the insurer, whether the insurer chose to sue the wrongdoer as subrogee or to sue the insured for breach of policy, or both."<sup>19</sup> However, as between co-defendants of this type in a joint suit, the insured must suffer for it is he "rather than a stranger to the insurance contract [who] must be conscious of the duties arising out of his relationship with the insurer."<sup>20</sup>

A case of first impression is that of *Trust Company of Chicago v. New York Life Insurance Company*.<sup>21</sup> The issue involved was the right of a conservator, appointed following adjudication of the insanity of the insured, to payments claimed due under a total disability clause in a life insurance policy. The wife of the insured, beneficiary under the policy, was also made a party de-

<sup>15</sup> 42 Ill. App. 138 (1890). This case appears to be the only prior Illinois case in point.

<sup>16</sup> *City of New York Ins. Co. v. Tice*, 159 Kan. 176, 152 P. (2d) 836, 157 A. L. R. 1233 (1944); *Hart v. Western R. Corporation*, 54 Mass. 99, 46 Am. Dec. 719 (1847).

<sup>17</sup> 280 Pa. St. 550, 124 A. 691, 36 A. L. R. 1262 (1924).

<sup>18</sup> 280 Pa. St. 550 at 555, 124 A. 691 at 692.

<sup>19</sup> 331 Ill. App. 250 at 255, 73 N. E. (2d) 12 at 15.

<sup>20</sup> 331 Ill. App. 250 at 258, 73 N. E. (2d) 12 at 16.

<sup>21</sup> 331 Ill. App. 468, 73 N. E. (2d) 789 (1947).

fendant to the action. The conservator sued for payments which the insured had refused to make on the ground that the one-time disability had ceased and also because the policy had lapsed for non-payment of premiums. The court below gave judgment to the conservator and failed to recognize the claim of the beneficiary for that part of the disability benefits which accrued after the adjudication of insanity.<sup>22</sup> The insurer appealed, claiming error in the refusal to give an instruction which directed that the jury, should it find the disability payments were due, were to return a verdict for the plaintiff only for the amount of the installments due up to the date on which the insured was found insane and for the beneficiary for installments accruing thereafter. When reversing that decision, the Appellate Court refused to give heed to the conservator's contention that the only one prejudiced by the alleged error was the beneficiary who had not appealed but instead held the requested instruction to be proper. The disability provisions of the policy were found to be susceptible of no other reasonable construction except that the insurer, on insanity of the insured, must make the disability payments to the beneficiary. Being bound to pay the beneficiary by the terms of the contract, the insurer could not be compelled to pay the conservator.<sup>23</sup>

A host of bills of importance in the field of insurance law were before the recent General Assembly and a number of them became enacted into law.<sup>24</sup> Particularly worthy of reference are the measures adopted<sup>25</sup> in compliance with the McCarran Act<sup>26</sup>

<sup>22</sup> The beneficiary had based her claim on a clause which read as follows: ". . . if disability results from insanity, income payments under this section will be paid to the beneficiary in lieu of the insured."

<sup>23</sup> In reaching its decision, the court accepted the views previously voiced in *Bach v. Nagle*, 294 N. Y. 151, 61 N. E. (2d) 421, 159 A. L. R. 1199 (1945), and in *Foulds v. New York Life Ins. Co.*, 256 App. Div. 930, 10 N. Y. S. (2d) 680 (1939).

<sup>24</sup> See also Wanless, "Legislation Affecting Practice," 36 Ill. B. J. 102.

<sup>25</sup> Laws 1947, p. 1098, H. B. 410; Ill. Rev. Stat. 1947, Ch. 73, §§ 1065.1 to 1065.18, and Laws 1947, p. 1111, H. B. 411; Ill. Rev. Stat. 1947, Ch. 73, §§ 1065.19 to 1065.35, inclusive. Laws 1947, p. 1110, H. B. 413; Ill. Rev. Stat. 1947, Ch. 73, § 1091, and repealing § 1087, was adopted to conform with H. B. 410 above mentioned. Since all rates, including those relating to compensation insurance, now fall within the area encompassed by the Department of Insurance, change was made necessary in the sections last referred to relating to providing insurance for employers who had been rejected by insurers for coverage under Workmen's Compensation and related statutes.

<sup>26</sup> 15 U. S. C. A. §§ 1011-5.

and the holding in *United States v. South-Eastern Underwriters Association*.<sup>27</sup> By these acts, certain new sections were added to the Insurance Code, and some former provisions were repealed, the whole being designed to permit of co-operative company action in rate-making and related matters, looking toward the establishment of uniform rates, rating systems, plans and practices. Rate schedules and the like are to be filed with the Director of Insurance who has the duty of disapproving any which are found to be excessive, inadequate or unfairly discriminatory. Sections 125 and 128 of the Code were amended by changing the limitation on the percentage of admitted assets available for investment in designated types of securities, the most important change being the increase from 50% to 60% now allowed for investment in the securities of solvent private corporations.<sup>28</sup> Group accident and health insurance may now be written on employees of members of a bona-fide association having a purpose apart from that of obtaining insurance<sup>29</sup> and the size of the group required has been halved.<sup>30</sup> A procedure has been set up for the conversion of fraternal benefit societies into mutual legal reserve life insurance companies, a matter not previously authorized by statute.<sup>31</sup> The Director of Insurance may refuse a license for an agent or broker on the ground that the applicant has shared, without full knowledge of the policy-holder, in an adjustment fee paid by the policy-holder for the processing of a claim.<sup>32</sup> The act providing for the organization of property life insurance companies has been repealed, removing useless luggage as no companies have been created under it.<sup>33</sup> Non-profit hospital service corporations and medical service plans have now been placed solely within the jurisdiction of the Department of Insurance and it has been provided that no such group may issue policies to subscribers in any

<sup>27</sup> 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944).

<sup>28</sup> Laws 1947, p. 1137, S. B. 585, and p. 1143, H. B. 412; Ill. Rev. Stat. 1947, Ch. 73, §§ 737 and 740.

<sup>29</sup> Laws 1947, p. 1125, S. B. 537; Ill. Rev. Stat. 1947, Ch. 73, § 979.

<sup>30</sup> Laws 1947, p. 1127, S. B. 557; Ill. Rev. Stat. 1947, Ch. 73, § 842.

<sup>31</sup> Laws 1947, p. 1123, S. B. 597; Ill. Rev. Stat. 1947, Ch. 73, § 911.1.

<sup>32</sup> Laws 1947, p. 1094, H. B. 794; Ill. Rev. Stat. 1947, Ch. 73, § 599.

<sup>33</sup> Laws 1947, p. 1152, H. B. 590; Ill. Rev. Stat. 1947, Ch. 73, §§ 1066-80 inclusive.

given county unless it has contracts with hospitals located therein operating a minimum of 30% of the beds there available.<sup>34</sup> Other minor changes have also been made relating to fraternal benefit societies.<sup>35</sup>

#### NEGOTIABLE INSTRUMENTS

Only one case worthy of mention falling within this field arose during the past year and that was the case of *Smith v. Reisch*<sup>36</sup> in which plaintiff sought to hold personally liable certain parties who had signed judgment notes as trustees trading as the Annie Reisch Investment Company, a common law trust of Sangamon County, Illinois. The court ruled that, under Section 20 of the Negotiable Instrument Law,<sup>37</sup> these notes were not the personal obligations of the signers even though there was no express authorization in the trust instrument for the making of judgment notes. By way of dictum, because of the statutory issue, reference was made to *Newby v. Kingman*<sup>38</sup> as authority for the holding that a trust could be held liable at law for its authorized contracts. The Negotiable Instruments Law served to insulate the defendants from personal liability because of the statutory language with respect to signing "in a representative capacity."

#### SALES

Very few cases relating to sales were of special significance or involved new points of law. In *Patargias v. Coca-Cola Bottling Company of Chicago*,<sup>39</sup> however, the facts disclosed a case involving the presence of a deleterious substance, *i.e.* a dead mouse, in a bottle of soft drink purchased and partly consumed by plaintiff

<sup>34</sup> Laws 1947, p. 679, H. B. 791; Ill. Rev. Stat. 1947, Ch. 32, §§ 553-5, 562, and 562a-562d, inclusive.

<sup>35</sup> See Laws 1947, p. 1124, H. B. 717, and p. 1130, H. B. 499; Ill. Rev. Stat. 1947, Ch. 73, §§ 904, 939 and 945.

<sup>36</sup> 329 Ill. App. 45, 67 N. E. (2d) 304 (1946). Leave to appeal has been denied.

<sup>37</sup> Ill. Rev. Stat. 1947, Ch. 98, § 40, states: "Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized. . . ."

<sup>38</sup> 309 Ill. App. 36, 32 N. E. (2d) 647 (1941).

<sup>39</sup> 332 Ill. App. 117, 74 N. E. (2d) 162 (1947).



to her physical injury and in which the Appellate Court affirmed a judgment in favor of the plaintiff. One of the grounds upon which plaintiff predicated her right to recover was that the defendant had breached an implied warranty that its product was fit for human consumption. The defendant, on the other hand, contended that there could have been no implied warranty as to the wholesomeness of its product available to plaintiff because of an absence of privity of contract. The plaintiff countered with the argument that an implied warranty to ultimate purchasers was imposed on manufacturers of food or beverages sold in sealed containers.

The Appellate Court acknowledged that the highest court of this state had not passed upon such a question but it did refer to two supreme court decisions elsewhere dealing therewith. In one of them, an Iowa case,<sup>40</sup> the court made a distinction between food products which were canned, bottled or wrapped in such a way that neither the nature of the contents nor the condition thereof might be known to the purchaser until opened for use and products which were packed in an observable condition. In the case of the former, it was said to be the duty of the manufacturer to see to it that food products put out by him were wholesome, and that an implied warranty as to fitness ran with the sale for the benefit of the consumer, rather than just to the wholesaler or retailer. Privity of contract was there held not to be controlling. The other case, from Texas,<sup>41</sup> was predicated upon an even broader basis for it declared that one who possesses a product, gives it the appearance of being suitable for human consumption, and places it in the channels of commerce, must expect some one to consume the same in reliance on its appearance and cannot avoid liability if harm follows. The Appellate Court saw fit to adopt the ideas expressed in those two cases, declared that where an article of food or drink is sold in a sealed container for human consumption public policy demands that an implied warranty that the article is wholesome and fit for use be imposed upon the manu-

<sup>40</sup> *Davis v. Van Camp Packing Co.*, 189 Iowa 775, 176 N. W. 382 (1920).

<sup>41</sup> *Jacob E. Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 164 S. W. (2d) 828 (1942).

facturer, and said that such warranty runs with the sale for the benefit of the consumer.

One of the issues in *Hart v. Evans*<sup>42</sup> was a question of compliance with the Illinois Bulk Sales Act<sup>43</sup> and raised the query whether a written statement, made under oath by the president of a corporation selling, in bulk, the major part of its goods and chattels, which stated that "upon information and belief" the list submitted contained the names of all the creditors was sufficient to satisfy statutory requirements. The court answered the question in the negative, considering such a statement fatally defective in view of the express provision that the sworn statement should be made by one "having knowledge of the facts."

Modification of the Bulk Sales Act has occurred in that now the vendee must receive from the vendor a list of creditors at least ten days, formerly five, before the consummation of the sale, and the vendee must at least ten, formerly five, days before taking possession of the goods notify the seller's creditors of the sale. He may pay to the vendor so much of the purchase price as shall be in excess of the total amount of the indebtedness of the vendor before the expiration of the ten-day period above mentioned.<sup>44</sup> Some minor changes have also been made in the provisions of the statute relating to the sale of securities<sup>45</sup> and to the sale of livestock.<sup>46</sup>

#### QUASI-CONTRACTS

Undue retention of money rightfully due to a plaintiff may lead to the imposition of an obligation to pay interest on the sum retained, even though there be no promise to that effect,<sup>47</sup> for such an obligation may well be imposed by statute.<sup>48</sup> Where such a quasi-contractual liability is sought to be enforced, however,

<sup>42</sup> 330 Ill. App. 385, 71 N. E. (2d) 546 (1947).

<sup>43</sup> Ill. Rev. Stat. 1947, Ch. 121½, §§ 78-9.

<sup>44</sup> Laws 1947, pp. 1516-7, S. B. 571; Ill. Rev. Stat. 1947, Ch. 121½, § 78.

<sup>45</sup> Laws 1947, pp. 1518-23, H. B. 856; Ill. Rev. Stat. 1947, Ch. 121½, § 96 et seq.

<sup>46</sup> Laws 1947, pp. 1517-8, S. B. 108; Ill. Rev. Stat. 1947, Ch. 121½, § 215.

<sup>47</sup> See *Wittemore v. People*, 227 Ill. 453, 81 N. E. 427, 10 Ann. Cas. 44 (1907).

<sup>48</sup> Ill. Rev. Stat. 1947, Ch. 74, § 2.

it is generally granted only if the debtor has been guilty of that unreasonable or vexatious delay referred to in the statute for there was no common-law duty to pay interest.<sup>49</sup> It was for that reason, therefore, that the Illinois Supreme Court in part reversed the holding in *Woodruff v. City of Chicago*,<sup>50</sup> a suit brought to recover payments made under a special assessment proceeding for a street widening which had been abandoned by the municipality, because it was of the opinion that the city had done nothing to impede the creditor in his efforts to recover the money so paid other than to insist upon a judicial determination of its liability in that respect.<sup>51</sup>

### III. CIVIL PRACTICE AND PROCEDURE

In the years since the adoption of the Civil Practice Act most of the debatable problems concerning the conduct of litigation under the reformed system of procedure have been ironed out although questions do still arise. Cases which have dealt therewith are here summarized and arranged in much the same order as these questions are likely to develop in the conduct of a given case.

#### AVAILABILITY OF REMEDIES

As the fruits of litigation can rise no higher than the source, the practitioner's first concern should be with aspects of jurisdiction for if that is lacking all other efforts will prove wasted. No questions have arisen as to the power of the major nisi prius courts to entertain suits<sup>1</sup> and only one minor and indirect point

<sup>49</sup> *Totten v. Totten*, 294 Ill. 70, 128 N. E. 295 (1920).

<sup>50</sup> 394 Ill. 542, 69 N. E. (2d) 287 (1946), in part reversing 326 Ill. App. 577, 63 N. E. (2d) 124 (1925).

<sup>51</sup> In that regard, see *Ritter v. Ritter*, 381 Ill. 549, 46 N. E. (2d) 41 (1943), reversing 313 Ill. App. 407, 40 N. E. (2d) 565 (1942).

<sup>1</sup> But see the discussion dealing with the jurisdiction of city courts in divorce matters elsewhere in this survey under the topic of Family Law. Attention might also be called to legislative revision of the statute relating to courts for cities and incorporated towns: Laws 1947, p. 766, S. B. 36, Ill. Rev. Stat. 1947, Ch. 37, § 333 et seq.; to some increases in compensation for judicial officials: Laws 1947, p. 773, S. B. 154, p. 776, S. B. 580, and p. 796, S. B. 187; as well as to some changes in pension arrangements for judges: Laws 1947, p. 775, H. B. 136, and p. 774, H. B. 512.